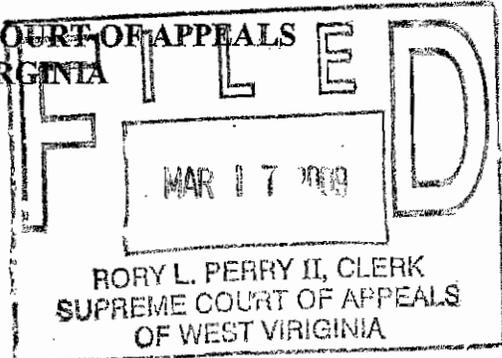


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA



STATE OF WEST VIRGINIA
ex rel. GREGORY BURDETTE,

Petitioner,

Supreme Court Number
Underlying Kanawha County Circuit
Court Action:
SER Burdette v. Haynes, Warden,
07-MISC-139

THE HONORABLE PAUL ZAKAIB, JR.
Kanawha County Circuit Court Judge,

Respondent.

PETITION FOR A WRIT OF MANDAMUS
AND MEMORANDUM OF LAW

Comes the Petitioner, Gregory Burdette, by counsel, Barron M. Helgoe, and prays that a Writ of Mandamus issue against the Respondent, the Honorable Paul Zakaib, Jr., Kanawha County Circuit Court Judge, directing him to grant the previously filed and argued Motion for Post-Conviction DNA Testing as filed as part of the above reference habeas corpus action, Kanawha County Circuit Court Number 07-MISC-139.

In this Original Jurisdiction mandamus proceeding, this Court's jurisdiction is invoked under Rule 14 of the *West Virginia Rules of Appellate Procedure*. As this Honorable Court recently held, three elements must co-exist for an action in mandamus to lie: (1) a clear legal right of the Petitioner to the relief sought; (2) legal duty of the Respondent to do what the Petitioner seeks to compel; and (3) absence of another adequate remedy. *State ex rel. Bailey v. State Division of Corrections*, 584 S.E.2d 197

(W.Va. 2003); *State ex rel. Shifflet v. Rudloff*, 582 S.E.2d 851 (W.Va. 2003). Since the Petitioner has a clear legal right to the relief sought in the absence of another adequate remedy, mandamus lies to require the proper discharge by a public officer of a non-discretionary duty, all three elements necessary to maintain a mandamus action coexist. Further, W.V. Code § 15-2B-14(j) specifically directs petitioners who have been denied a DNA test pursuant to the statute to seek review through a writ of mandamus or prohibition.

The Petitioner does not enjoy filing a petition in this Honorable Court requesting that a Circuit Court Judge be compelled to properly perform his duties. However, the wrongfully imprisoned Petitioner whose proof of innocence lies within the DNA to be tested feels compelled to take this extraordinary step and seek this Court's intervention.

The facts of this case are well known to this Honorable Court from the prior submissions, including the direct and denied criminal appeal and the original and denied habeas. However, a recitation of the facts is in order.

PROCEDURAL HISTORY

On April 11, 1986, a Kanawha County Circuit Court jury convicted Gregory Charles Burdette, the Petitioner herein, of six counts of forgery; six counts of uttering; one count of kidnapping (without a recommendation of mercy); and one count of first degree murder, with a recommendation of mercy. The jury did not return a verdict on the indicted offense of aggravated robbery because it was designated as the underlying felony in the State's felony-murder theory. On June 2, 1986, the Petitioner was sentenced to concurrent sentences: one to ten years each on the forgery and uttering convictions, life with mercy on the murder conviction, and life without mercy on the kidnapping

conviction. Mr. Burdette direct appeal was refused by the West Virginia Supreme Court of Appeals on November 7, 1989. His initial habeas petition began in 1993 was denied on January 26, 2004. The appeal of the petition was refused by the West Virginia Supreme Court of Appeals on January 19, 2005. West Virginia Code § 15-2B-14 became effective on November 16, 2004. On March 28, 2007, the Petitioner filed a pro-se habeas corpus petition founded upon the false reports or short cuts by the State Police taken during the time the disgraced F. S. Zain was working for the State lab. The undersigned was appointed to review this case and filed a Motion for Post-Conviction DNA Testing as a preliminary step in preparing the habeas petition. A hearing on the motion was held on October 27, 2008 and the motion was denied in an order filed on March 2, 2009 and received by counsel on March 11, 2009. See Appendix A. The writ follows as permitted by *W.V. Code* § 15-2B-14(j).

BACKGROUND

At approximately four o'clock in the afternoon on Friday, November 18, 1993, a deer hunter on an isolated hillside in the Second Creek area of northern Kanawha County discovered the shoeless body of Vincent Tyree. Crime scene reconstruction revealed he had been shot approximately one hundred yards from where his body was found. Physical evidence included a cigarette lighter encrusted with several spots of a white plaster-like substance, a cigarette butt with teeth bite marks, a checkbook with a bloody fingerprint, and a spent .38 caliber bullet dug from blood-soaked dirt and leaves. An autopsy revealed Tyree had been shot twice in the back of the head, probably between three and four o'clock the previous afternoon. (Tr. 2127-28, 2283, 3117-18, 3313).

Forty-eight year old Vincent Tyree, a coach at Sissonville Junior High School, and his wife Carolyn, a gym teacher at a nearby high school, had a three-unit apartment building under construction about a mile from their home. (Tr. 3304-07). With their daughter Kim, they lived a tenth of a mile from the high school. Kim worked at the Charleston Town Center, and in the evenings conducted dance classes for small children at her studio in the unfinished apartment building. (Tr. 3305-06, 3322).

During construction of the apartments, Tyree's normal weekday routine was to leave school in his Jeep at about three o'clock, change clothes at home, then spend the remainder of the evening at the work-site. (Tr. 3328). He was known to have left school shortly after three o'clock on Thursday, the day of his death. (Tr. 2127-28).

Carolyn Tyree also left school around three o'clock that Thursday. Because she had to attend parent-teacher conferences that evening, she drove to the apartments to remind her husband he was expected to pick Kim up at the Town Center in time for her 6:30 dance class. She said Vincent was not at the apartments, but she assumed he would remember to meet Kim. (Tr. 3321-24).

Mrs. Tyree testified, however, that around 6:20 p.m., one of the dance students notified her that Kim had not shown up for class. Later Kim arrived at school crying because no one had picked her up after work. At that point, Mrs. Tyree became concerned for her husband and left school. (Tr. 3324-25).

Family and friends spent the remainder of the evening searching for Mr. Tyree. Sometime after ten o'clock, Mrs. Tyree telephoned Gregory Burdette, who had been working at the apartments as a drywall finisher. He told her Mr. Tyree had not been at the apartments that day. Around eleven o'clock Tyree's Jeep was located across from

Humphreys United Methodist Church, near the Sissonville junior high school. It was towed to the Tyree home, and police were officially notified of his disappearance. (Tr. 3326-41).

The next morning, Friday the 18th of November, Greg Burdette appeared at the Tyree residence seeking the keys to the apartments so he could begin work. Mrs. Tyree explained her husband had not been located and work would be halted until she learned of his whereabouts. (Tr. 3341-43).

Twenty-five year old Gregory Burdette, a former resident of Sissonville, had dropped out of the ninth grade and had learned the trade of drywall (sheet-rock) finishing from his father who, at the time of trial, was permanently disabled from a stroke and heart attack. (Tr. 4135-39, 4205-06). Mr. Burdette had verbally contracted with Mr. Tyree in early November to hang and finish drywall at the apartments. In turn, he had employed his uncle and another man to do the more manual job of hanging the drywall, reserving for himself the more exacting finishing work — filling in the cracks and nail indentations with a plaster-like substance, then sanding in preparation for painting. (Tr. 2473, 4208-09).

Mr. Tyree's body was discovered on Friday afternoon. Shortly after midnight sheriffs deputies met with Mr. Burdette at his apartment in the Spring Hill section of South Charleston. He agreed to accompany them to headquarters for questioning, and consented to being photographed and fingerprinted. (Tr. 2418, 2429).

Kanawha County Deputy John Seymour testified Mr. Burdette provided no information helpful to the investigation during the initial interview. (Tr. 239-40)

At trial Mr. Burdette testified that he had worked alone at the apartments on Thursday, the 17th, and quit around three o'clock. He said he stopped at the Go-Mart in Spring Hill, a short distance from his home (Tr. 4231-32), and arrived home at four o'clock. (Tr. 2486, 4254). His presence at the Go-Mart and his arrival home at the stated times was verified by several defense witnesses. (Tr. 3718, 3825, 3855).

Prior to Deputy Seymour's initial interview with Mr. Burdette, Annica Cummings, a young lady who knew both Tyree and Burdette, reported to police that between 3:00 and 3:15 p.m. on the 17th, she had seen Mr. Tyree driving north in his Jeep with a male passenger. She and a friend had been driving south on Route 21 near Second Creek. Shown a photographic array, she was positive Gregory Burdette was not the passenger. (Tr. 2098-2107, 2433-34, 2440).

Mr. Burdette was next interviewed by sheriff's deputies on Tuesday, the 22nd of November. He told them he had last seen Mr. Tyree on Wednesday, the 16th of November, when Tyree briefly stopped at the apartments after school before returning to school for parent teacher conferences. Mr. Burdette insisted he had not seen Mr. Tyree on Thursday, the day of his disappearance. (Tr. 2470).

During the evening of December the 2nd, Deputy Seymour, while off duty, visited Mr. Burdette at his residence. He socialized for several hours, eating pizza and watching television. At trial, he revealed his real purpose had been to obtain cigarette butts from Mr. Burdette for forensic comparison with the one found at the crime scene.¹ (Tr. 2558-62, 2646-50)

¹. Trial evidence evidence of the cigarette butts attributed to the Petitioner passed through Trooper Fred Zain to Lynn Inman at the West Virginia State Police Crime Lab. Tr. 2764). Zain did not testify at trial or apparently do any actual testing of the evidence.

On December 6, 1983, Mrs. Tyree reported to Deputy Seymour that her bank had questioned six checks drawn on the Tyrees' checking account. The checks, all cashed in a seven day period, between November 10th and 17th, and amounting to \$2,300.00, were made out to, and endorsed by, a "Dale Burdette"; the payor was listed as Vincent Tyree. Memoranda on the checks reflected they were intended as compensation for wages for drywall work, or for the purchase of building materials. (Tr. 2237-46, 4288). Two days later State Police reported the checks had been forged. (Tr. 374).

On December 13, 1983, Kanawha County Deputies Drennen and Markham told Mr. Burdette they "had him cold on the checks." (Tr. 3557). They did not, however, charge him or place him under arrest.² (Tr. 3577-80).

The police again interviewed Mr. Burdette on December 14, 1983. (Tr. 3366). He admitted to signing the name "Dale Burdette" to all six of the Tyree checks. He said a "Kenneth Mitchell" on several occasions had taken checks from Mr. Tyree's Jeep, filled them out, and gave them to him to cash at the Big H Supermarket in Sissonville. (Tr. 3384-86). Mr. Burdette described Mitchell and said he had met him a couple of months earlier at Shoney's Boulevard Recreation Center in Charleston. (Tr. 3389, 3392).

Ms. Inman found saliva in the cigarette filter found at the murder scene. Her trial testimony indicated that the saliva contained genetic markers consistent with those found in cigarette filters obtained from Burdette and with thirty-four percent of the general population. (Tr. 2783-85). Burdette had a habit of biting the filters of the cigarettes he smoked. (Tr. 3430). Trial testimony indicated the filter found at the crime scene contained bite marks. Laboratory tests, however, apparently obliterated any indentations. (Tr. 3581-90).

² Detective Drennen testified: "[T]here's nowhere carved in stone that I have to make an arrest just because I have probable cause." (Tr. 3580-81). He acknowledged, however, if Greg had been arrested, in all probability, a lawyer would become involved. (Tr. 3580).

Early into the December 14th interview, the State Police interposed to take handwriting exemplars from Mr. Burdette. (Tr. 3403-04). When the interview continued, Mr. Burdette said he knew Kenneth Mitchell as "Butch." He said after he started working for Mr. Tyree, Butch questioned him as to whether Tyree had any money, and wanted to know where Tyree kept his checkbook. He said Butch later visited the job site and had two of Tyree's checks, claiming he had taken them from Tyree's Jeep at the junior high school. Mr. Burdette then told the police that his previous statement that Butch had filled out the checks was not true. Rather, it was he, not Butch Mitchell who had filled them out, although Butch had suggested the amounts. (Tr. 3405-07).

Mr. Burdette told the officers that on Wednesday, the 16th of November, Butch claimed he was out of checks but would obtain more. Mr. Burdette said he saw him again the following Friday,³ and once more cashed a check on Tyree's account. Butch told him it would be the last one. (Tr. 3409-10).

After further questioning, Mr. Burdette told the officers he had wanted to tell them the truth on the night Tyree's body was found, but he had been afraid of Butch Mitchell. (Tr. 3425). When asked to speculate as to how Mr. Tyree might have been killed, he said he believed Mitchell had killed him, possibly after being caught stealing checks. (Tr.3416).

The interview with Mr. Burdette continued, and he added new information to his previous statements. He told the officers that on Friday, the 18th of November, Mitchell had taken him to the Second Creek area and showed him a body, although he had not

³ No checks cleared on Tyree's bank account as having been cashed on Friday, the day his body was discovered. (Tr. 2237-46). As far as the police could determine no checks were cashed on that date. (Tr. 3614).

been close enough to identify it as Mr. Tyree's (Tr. 3435). He also said Mitchell had thrown a pair of shoes out the car window as they drove away from the area. (Tr. 3437).

With more questioning, Mr. Burdette added more new information. He said when he had been taken to the Second Creek location Mitchell forced him to pull Mr. Tyree's body over the hill in an effort to conceal it. (Tr. 4340). He also explained Mitchell had removed Tyree's shoes because of possible fingerprints on them. (Tr. 3442, 3444). Mr. Burdette said Mitchell, who was from Ohio, had known of the Second Creek location because he had once suggested it to Mitchell as a possible hiding place for a stolen car. (Tr. 3441).

Mr. Burdette told the police Butch Mitchell handed him a checkbook while on the hill at Second Creek, but he gave it back. He didn't recall any blood on his hands, and he didn't know what had happened to the checkbook after he returned it. (Tr. 3445).

Late the next evening, Thursday, the 15th of December, Mr. Burdette gave another statement, which differed from his previous one. (Tr. 3452-71). He said that about 2:30 p.m. on Thursday, the 17th of November, Billy Eads (who Mr. Burdette said used the alias, "Butch Mitchell" (Tr. 3461)), had come to the Tyree apartments. He told Mr. Burdette he had almost been caught the last time he had taken checks from Tyree's Jeep at the school, and he ordered Mr. Burdette to go with him to act as his look-out at the school. Mr. Burdette said that while he kept watch, Mr. Tyree came out of the school building. He said he attempted to intercept Mr. Tyree, but was too late; Eads pulled a pistol and forced Mr. Tyree into the Jeep. He also motioned Mr. Burdette into the Jeep,

then inquired as to a good place to take Tyree so as to give them time to escape. Mr. Burdette said he suggested Second Creek. (Tr. 3255-56).

Mr. Burdette said when they left the Second Creek paved road to follow the dirt trail up the hill, Eads ordered Mr. Tyree out of the Jeep to engage the wheel hubs into four-wheel drive. Prior to reaching the top, Mr. Tyree was again ordered out. As the trio started walking, with Mr. Tyree in front, Billy Eads shot Mr. Tyree twice, then ordered Mr. Burdette to drag the body over the hill where Eads removed Tyree's wallet, keys and shoes. Mr. Burdette said he was then required to drive the Jeep to Humphreys United Methodist Church where his own car had been parked. He drove Eads to the Big Star Supermarket in Sissonville, returned and secured the apartments, then left for home. (Tr. 3456-59). He said he arrived home at four o'clock, just as "Hour Magazine" was coming on television. (Tr. 3465).

Mr. Burdette told the police he had known Eads for several years and identified him from a photographic array. (Tr. 3459). He also told them there had been a small spot of blood on his own hand at the crime scene, but insisted he had not touched the checkbook after the murder. (Tr. 3465). Finally, he said another check had been cashed the day after the homicide.⁴ (Tr. 3466). The Statement of the 15th of December, concluded at 12:45 a.m. on the 16th. (Tr. 3471).

About three hours later Mr. Burdette gave another version of the events leading to Mr. Tyree's death. The events were essentially unchanged, but he stated it was Billy Edens, and not Billy Eads, who had stolen Mr. Tyree's checks and who had killed him.

⁴ No checks cleared the Tyrees' account as having been cashed on the day after the homicide.

(Tr. 3474-87). Edens was arrested that morning and charged with murder. (Tr. 3364).

Three days later Annica Roe identified Edens as the man she had seen in the Jeep with Mr. Tyree. (Tr. 3364). Following a preliminary hearing on December 23, 1983, with Mr. Burdette as a witness for the State, Edens was bound over to the grand jury, based on Mr. Burdette's testimony. (Tr. 387, 416, 2676).

On December 31, 1983, the police again questioned Mr. Burdette after learning that he had purchased a .38 caliber pistol seven days prior to Tyree's death. Mr. Burdette admitted that he had bought the gun but said he had purchased it for a juvenile, Scott Shaw. (Tr. 3511). On January 2, 1984, however, Mr. Burdette stated he had purchased the pistol at the request of Billy Helmick, a former schoolmate, and not for the juvenile Shaw. He said he had given the gun to Helmick, and, it was Helmick, not Edens, who had killed Mr. Tyree. The facts were unchanged, but the perpetrator of Mr. Tyree's death was Helmick. (Tr. 3492-93). Mr. Burdette characterized Helmick as "crazy", and said he was afraid of him. (Tr. 3494, 3502). After a futile search of the Poca River area where Mr. Burdette told police Helmick had thrown the gun, Mr. Burdette was arrested. (Tr. 3512-16).

At trial, the State introduced evidence to show that a blood-smeared fingerprint found on Mr. Tyree's checkbook belonged to Mr. Burdette (Tr. 2934), while the blood was consistent with Mr. Tyree's (Tr. 2774); that the blood had been on the finger when it touched the check (Tr. 2858); that genetic markers in the saliva of the cigarette butt found at the crime scene were consistent with Mr. Burdette's (Tr. 2783-84); and, that plasterlike material on the cigarette lighter was consistent with the plaster material used by Mr. Burdette at the Tyree apartments. (Tr. 3068).

Lynn Inman, an employee of the Department of Public Safety in the serology laboratory, testified that the State Police Laboratory performed tests on materials connected to the killing of Mr. Tyree. She received a checkbook that had a check with red stain on it (Tr. 2751), a pair of pants with a belt, a pair of socks, a T-shirt, a pair of underwear, a brown shirt, a tan coat, a known blood sample of Vincent Tyree, sections of upholstery from a car seat, pieces of bullets, **a cigarette butt found at the scene of Mr. Tyree's murder, State's Exhibit 6**, leaves with blood on them, a blood sample from the road, cigarette butts from "Dale" Burdette, the known saliva sample of Ronald Ashworth, the known saliva sample of Billy Helmick, and **State's Exhibit 47, which were three bags: cigarette butts from a vehicle, and cigarette butts from Gregory Burdette's house.** (Tr. 2753-64). The items, except for the cigarette butts and saliva samples, were tested for the presence of human blood., any human blood found was identified by type, and other chemicals in the blood were identified as to type. (Tr. 2770). According to her testimony the known blood sample of Vincent Tyree contained the following genetic markers: (ABO) Type A; (PGM) Type 1+, 1+; Esterase D, Type 1; Glyoxalse, Type 2-1; (EAP), Type B, A; (AK), 1; and (ADA), 1. The blood found on the clothing, the car seat material, the bullets, and the leaves were all consistent with the seven genetic markers identified in Mr. Tyree's blood sample. The test performed on the checkbook showed the following genetic markers: (ABO) Type A, and (PGM) 1+, 1+, which was consistent with Mr. Tyree's blood. (Tr.2773-74). **Saliva found on cigarette butts from the scene of the murder (State's Exhibit 6) were only tested for ABO type, and Ms. Inman testified that the result of such a test was Type O. (Tr. 2777). The tests performed on the known cigarette butts of Gregory Burdette also showed Type O results. (Tr.**

2783). Ms. Inman testified that thirty-four percent of the population are Type O secretors. (Tr. 2784).

No longer a suspect, Billy Edens was released from jail on January 4, 1984. (Tr.3561). At trial, however, the State sought to show that Mr. Burdette, even after claiming it was Billy Helmick and not Billy Edens who had killed Mr. Tyree, entered into a conspiracy with two other jail inmates to again blame Edens for the murder. It was a bizarre and improbable tale told by Gregory Elswick, one of the alleged conspirators, awaiting resentencing on an unrelated sexual assault felony conviction. Elswick even claimed Burdette had confided sole responsibility for the murder. (Tr. 3134-35). Both Mr. Burdette and the third alleged conspirator, Walter Williams, denied any truth to Elswick's story. (Tr. 3882-84, 4228-31).

Multiple eyewitnesses testified that Mr. Burdette was miles away at the time of the murder.

At trial, Mr. Burdette admitted to the forgery and uttering of the checks, which he said he had stolen on the 7th and 8th of November from Tyree's Jeep while it was parked in front of the apartments. (Tr. 4210-11). He denied, though, any knowledge of Tyree's kidnapping or death. (Tr. 4212, 4238). He said his pre-trial statements implicating Eads (Mitchell), Edens and Hemlick were contrived, as an attempt to appease police who had warned him he faced up to 120 years in prison on the check charges unless he helped them in the murder case. (Tr. 4253). He explained he had learned the results of police investigation from the investigating officers, and in turn, used the information to make his stories credible. (Tr. 4239-53). He said whenever the police proved his story wrong, he would simply change it until it couldn't be discredited. (Tr. 4255).

Mr. Burdette conceded he had purchased a .38 caliber revolver and ammunition prior to Mr. Tyree's death ⁵ with a portion of the proceeds from the forged checks. (Tr. 4269). He maintained, however, he had purchased the gun for protection of his home after it had been burglarized. ⁶ (Tr. 4219-20). He said three days after Mr. Tyree's death he threw the gun and the ammunition in the Kanawha River because the gun had been purchased illegally, and he was afraid he would be caught. ⁷ (Tr. 4223). He denied going to the hill where the murder occurred until December, which would have been well after the investigation and the forensic evidence allegedly tying him to the scene had been collected. (Tr. 4237-4238). He flatly denied having anything to do with Mr. Tyree's unfortunate death. (Tr. 4238).

To preclude the possibility of a jury verdict of a lesser degree of homicide than first-degree murder, the State, over defense objection, submitted its homicide case to the jury solely on the theory of felony-murder. This strategy by the State raised the issues whether robbery, the predicate felony, had been proven beyond a reasonable doubt, and whether the jury had been clearly and fully instructed on the elements of robbery. On the

⁵ On November 10, 1983, Burdette purchased a model RG31, .38 caliber revolver and a box of Remington .38 special shells of one hundred and fifty grains. (Tr. 2694, 2721, 4215). The gun was never recovered by the police. The State Police Firearms and Toolmarking Examiner testified Mr. Tyree had been shot by .38 Special .357 Magnum caliber bullets of Remington-Peters manufacture. Weapons capable of firing the bullets include the RG31. (Tr. 2887-94).

⁶ South Charleston Police Detective M.A. Tucker testified Burdette had filed a report of an entering without breaking on October 31, 1983. (Tr. 2887-94).

⁷ Greg had used his driver's license as identification to purchase the pistol. The license contained his picture, but the name of his retarded brother John. (Tr. 4215-19).

kidnapping charge, the trial court neglected to provide guidance to the jury in distinguishing between evidence of asportation as an essential element of kidnapping, and asportation as merely incidental to the crime of murder.

During the State's closing argument the prosecutor implied the Petitioner's alibi witnesses were liars because they had not come forward prior to trial with the information; he sought to negate the Petitioner's alibi on the basis the Petitioner's disabled father had not testified in his behalf; and, he challenged the jury to attempt to recall the specific time and date of a recent jury view of the crime scene, as a means of demonstrating to them the untrustworthiness of the Petitioner's alibi witnesses. Finally, the prosecutor's closing argument unfairly sought to inflame the passions and prejudice of the jury, not only to return a verdict of guilty on all counts, but to also deny any recommendation of mercy.

ZAIN III

The Petitioner has a right pursuant to a full habeas review of the serology evidence presented against him by Lynn Inman of the State Police Laboratory pursuant to *In the Matter of RENEWED INVESTIGATION OF THE STATE POLICE CRIME LABORATORY, SEROLOGY DIVISION*, 219 W.Va. 408, 633 S.E.2d 762 (2006) because his conviction falls within the time period of 1979 and 1999. DNA testing is far more accurate than the general blood type testing done by the lab previously. Accordingly, DNA testing will determine more accurately whether the Petitioner's identity can be tied to the forensic evidence at the murder scene. If the DNA test results show that the Petitioner was not at the murder scene, the blood type serology evidence previously conducted will clearly be considered unreliable. However, the Court need not measure

the request for DNA testing further than the statutory elements of West Virginia Code § 15-2B-14, all of which are met by the Petitioner. DNA testing is a judicially efficient means of resolving the underlying critical issue of the Petitioner's presence at the murder.

ARGUMENT

Statutory elements satisfied

Contrary to the Circuit Court's finding below, the Petitioner satisfied all elements of the non-waivable right to post-conviction DNA testing: to wit:

W.V. CODE § 15-2B-14 STATUTORY ELEMENTS

(A) Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.

The identity of the perpetrator was the central issue in the case. There were no eyewitnesses.

(B) Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.

DNA will prove the Petitioner was not the secretor of saliva found in the cigarette butts found at the scene; cigarette butts tied to the Petitioner only a large blood group type. This evidence was critical (see below) to the government's case as the butts and a partial fingerprint were the only forensic evidence placing the Petitioner at the scene of the murder and kidnapping. An FBI print examiner claimed the print was the Petitioner's. However, the partial print itself could not be used, and therefore, matched to the Petitioner by the West Virginia State Police. The Petitioner has maintained his innocence for some twenty two years since he was incarcerated in 1986. There were no eyewitnesses that placed the Petitioner at the murder scene. The Petitioner

presented numerous alibi witnesses placing him at a convenience store at the time of the murder. The original prosecutor stated in the closing that “[t]here is no evidence in this case, not a shred...that there anybody on the hill, but Greg Burdette, is there.” (Tr. 4494). Thus, DNA testing substantially disproving the Government’s theory of the Petitioner’s presence would have raised the reasonable probability that Mr. Burdette’s verdict would have been more favorable.

(C) Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.

Known cigarette butts used by the Petitioner were used to compare to the butts found at the murder scene. Both the sample set and the murder scene set are in evidence and available for testing.

(D) Reveal the results of any DNA or other biological testing previously conducted by either the prosecution or defense, if known.

No DNA tests were done in 1986 or since by either party. Blood group typing was done and was relied upon by the prosecution at the trial.

(E) State whether any motion for testing under this section has been filed previously and the results of that motion, if known.

No motion was previously filed.

DISCUSSION

The Petitioner needs the DNA test to establish that Mr. Burdette was not the secretor of saliva found in the cigarette butt found at the scene. This test will raise a reasonable probability that the verdict would have been more favorable. The

Government appeared to be demanding below that the Petitioner disprove the case before any test is conducted. It was putting the cart before the horse.

In doing so, it is the Government, and the Court below, ignored evidence and statements to the jury drawing a clear line from the not-then-available DNA evidence to the Defendant's identity and alleged guilt. The State tied the cigarette butt to the location of a large blood spot and drag marks for the body. The victim was shot and dragged over a hillside.

Direct questioning of Corporal Cobb:

Q: Okay, and what if anything did you discover at that time?

A: Okay, at that time [on November 19, 1983, the day after the evening the body was discovered] I discovered – excuse me, a – at the large blood spot at the top of the hill where the pipeline road is and the large blood spot, I discovered a bullet had been dug up out of the blood spot. There was a cigarette lighter that I'd located along the right side of the road here (indicating), a cigarette butt and some change.

Trial transcript at 2164-2165.

...

Q: And where were these items in relation to the blood spot?

A: The cigarette butt was approximately 20, 25 feet from the blood spot, the change was also probably 20 to 25 feet from the blood spot. There was the drag mark and the large blood spot down to where the body was, the cigarette butt—standing at the body, looking back up the hill, the

cigarette butt was on the lefthand side of the drag mark. The change was on the right side.

Q. Okay.

A: Of the drag mark.

Q: Okay. How far was the drag mark from the cigarette butt?

A Probably five to six feet.

Trial transcript at 2176.

Q: And the cigarette butt, you indicated I believe when Mr. Mitchell asked you, did you make a mark on the cigarette butt; is that correct?

A: Yes.

Q: Is there any particular reason why you did not make a mark on the cigarette butt?

A: I didn't want to take a chance on changing the cigarette butt in any way, taking a chance on destroying any type of evidence that may be on the cigarette butt.

Re-Direct of Corporal Cobb, trial transcript of at 2217-2218.

Deputy Seymour testified that during the evening of December the 2nd, while off duty, he visited Mr. Burdette at his residence. He socialized for several hours, eating pizza and watching television. At trial, he revealed his real purpose had been to obtain saliva samples from cigarette butts from Mr. Burdette for forensic comparison with the one found at the crime scene. (Trial transcript at 2558-62, 2646-50). He also noted photograph (State's Exhibit 74) depicting the cigarette butt (State's Exhibit 6) found at he

scene: "That's the inside of the filter and it depicts where it's been bit on the end." Trial transcript at 2566.

The State returned to this evidence time and time again and made a strong point of attacking the Defendant with regard to the cigarette butt found with a pinched filter at the scene.

Q: Did you bite your cigarettes?

A: Not all the time.

Q: Do you bite your cigarettes?

A: Not now.

Q: Did you bite your cigarettes then?

A: I may have.

Q: "Q And I noticed this nervous habit that the ends of the filter tip all have bite marks on them, the nervous habit that you have. A. When I am not nervous, I do the same thing." Now, do you remember?

A: I may have said that.

Q: Was that a lie?

A: Well, I sometimes would and sometimes I wouldn't.

Q: Sometimes you would lie and sometimes you wouldn't lie?

A: Sometimes I would bite my cigarettes and sometimes I wouldn't.

Q: And sometimes you bite your cigarettes; don't you?

A: Sometimes.

State's cross of Gregory Burdette, at page 4273-4274.

MOREOVER, THE STATE CLOSED ITS CASE BY COMPELLING THE DEFENDANT TO DISPLAY HIS TEETH TO THE JURY TO EMPHASIZE HIS BITE AND THE BITE MARKED CIGARETTE BUTT. This is evidence the State now, without irony, claimed below is immaterial.

MR. BROWN:... Your honor at this time, I would also move the Court that the Defendant come before the jury and display his teeth to the jury.

THE COURT: How do you want to that; just stand in front of the jury?

MR. BROWN: Stand on this side, stand in the middle, stand on the other side, so all the parties can see. I'd like to show his teeth, side view, both sides and front.

THE COURT: Okay. Mr. Burdette, would you step forward and open your mouth and show the jury your teeth.

(Object and exception)

MR. BROWN: Front view, please.

(At this time the Defendant stood in front of the jury box. (Indicating).)

MR. MITCHELL: I think we have already indicated our position, Your Honor.

THE COURT: Yes.

MR. BROWN: Turn please, all right, sir.

(The Defendant indicated to the jury)

MR. BROWN: Turn to your left.

(The Defendant indicated to the jury)

MR. BROWN: Turn to your right.

(The Defendant indicated to the jury)

MR. BROWN: A little wider please, all right, sir.

(The Defendant indicated to the jury)

MR. BROWN: The other side.

(The Defendant indicated to the jury)

MR. BROWN: Front view, please, turn to your left a little wider, please.

(The Defendant indicated to the jury)

MR. BROWN: Turn to your left. All right, sir, a little wider, please there on the left.

(The Defendant indicated to the jury)

MR. BROWN: All right, thank you.

THE COURT: You may take your seat.

MR. BROWN. The State of West Virginia rests.

Trial transcript at 3646-3648.

In closing the State then pounded on this key evidence.

“What is especially interesting is those checks, is that if it hadn’t been for a few slipups that Gregory Burdette made, leaving a cigarette butt at the scene... then perhaps the checks would never have been discovered.”

State’s closing argument at 4378-4379.

“There is no evidence in this case, not a shred, not that much (indicating), that there is anybody else on that hill, but Greg Burdette is there.”

State's rebuttal closing argument at 4494.

"His blood type matches that cigarette."

State's rebuttal closing argument at 4495.

"And the display, the cigarette butts, there is no marks on the cigarette butt. You look at the photograph of the cigarette butt, the cigarette butt, the cigarette butt that Gregory Burdette told you, told you in the statement, told you right there on the stand, "Yeah, I bite, I bite, I bite em" that's what he said. You look at the photograph. Don't look at the cigarettes, of course, the butt has been laying around in that package for what two, two and half years. It might flex back and have some of the wrapping taken off of it where it was examined, look at the photograph, see if you don't think there is bite marks in there."

State's rebuttal closing argument at 4488.

There were two other "slip-ups" alleged. A cigarette lighter with drywall and a fingerprint the State could not tie to the Defendant through the State Police fingerprint expert. Only the FBI examiner claimed that a single fingerprint on a check was the Defendant's. So, of the key forensic evidence, the one that has the most chance of clearly eliminating the Defendant as being present at the murder scene—feet from the drag marks and large blood spot--is the DNA found in the cigarette butt. It is this DNA evidence the Petitioner wishes to have tested.

In the proceedings below, the State took a 180 degree turn on this evidence, calling it "immaterial." This, when the State moved heaven and earth to tie this murder to the Petitioner through this very key piece of trial evidence, even going so far as to present

the Petitioner's teeth to the jury: as if to say, "Here is Vincent Tyree's killer. He stands before you. His teeth marked the cigarette butt. His blood type marked the cigarette butt. The very evidence found feet from where he dragged the victim; feet from where he shot the victim. Here is the face of the murderer!"

At this stage the Petitioner need not prove his innocence. He need only show that a straightforward DNA test will show there is a reasonable probability that the jury verdict would have been more favorable. How can it not? A DNA test WILL PROVIDE solid evidence that the Defendant was not at the murder scene. The test will prove that the cigarette, the one with the pinched filter and his blood type, is not his. It will fully bolster the *five direct witnesses* that place him away from the murder scene. Three placed him several miles away from the scene of the murder at the time of death between 3:20 p.m and 4:00 p.m. on the day of the murder, and two on the phone away from the murder scene at 4:00 p.m. talking to his mother. A DNA test will blow a hole beneath the waterline of the Government's case. It will bring evidence that directly contradicts a key argument that the Petitioner committed the murder. With such a test concluded, the painstaking habeas review can continue and be fully briefed.

The Petitioner has maintained his innocence for some twenty two years since he was incarcerated in 1986. The wise legislature has now made this powerful tool available to assist the administration of justice. As of March 12, 2009, some 233 wrongly accused have been freed because of DNA testing.⁸ In many of these cases the respective

⁸ According to the Innocence Project, www.innocenceproject.org, there have been 227 post-conviction DNA exonerations in the United States.

• The first DNA exoneration took place in 1989. Exonerations have been won in 32 states; since 2000, there have been 156 exonerations.

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prosecutors continued to assert the State's assertion of guilt and in each case the prosecutor was proven wrong. **In West Virginia alone, six (6) citizens have been wrongfully convicted and then freed because of DNA testing:** Glen Woodall (4.5 years), James Richardson (9 years), Larry Holdren (15 years), William O'Dell Harris (7 years), Gerald Davis (8 years), and Dewey Davis (8 years). <http://www.innocenceproject.org/news/state.php?state=wv>. In just these 6 cases, West Virginia prosecutors imprisoned innocent people for over half a century. Mr. Burdette has been imprisoned for 22 years.

The State's Kanawha County Prosecutor, and the Court below, now give short-shrift to this new legislative remedy and, in doing so, ignore the standard required by the statute. Moreover, it ignores the Constitutional mandate of the Sixth Amendment that a

-
- 17 of the 220 people exonerated through DNA served time on death row.
 - The average length of time served by exonerees is 12 years. The total number of years served is approximately 2,724.
 - The average age of exonerees at the time of their wrongful convictions was 26.
 - The true suspects and/or perpetrators have been identified in 85 of the DNA exoneration cases.
 - Since 1989, there have been tens of thousands of cases where prime suspects were identified and pursued—until DNA testing (prior to conviction) proved that they were wrongly accused.
 - In more than 25 percent of cases in a National Institute of Justice study, suspects were excluded once DNA testing was conducted during the criminal investigation (the study, conducted in 1995, included 10,060 cases where testing was performed by FBI labs).
 - About half of the people exonerated through DNA testing have been financially compensated. 25 states, the federal government, and the District of Columbia have passed laws to compensate people who were wrongfully incarcerated. Awards under these statutes vary from state to state.
 - 33 percent of cases closed by the Innocence Project were closed because of lost or missing evidence.

Leading Causes of Wrongful Convictions

These DNA exoneration cases have provided irrefutable proof that wrongful convictions are not isolated or rare events, but arise from systemic defects that can be precisely identified and addressed.

Defendant be able to present a defense. The Petitioner has overwhelmingly met every requirement of the statute with clear statements of fact based upon a review of the near 5000 page transcript. The People, through the legislature, enacted this statute to prevent the wrongful imprisonment of innocent persons, such as the Petitioner. The intent of the People to ensure that justice prevails will be vindicated by access to this remedy.

Moreover, a DNA test is in keeping with the Petitioner's right pursuant to a full review of the serology evidence presented against him by Lynn Inman of the State Police Laboratory pursuant to *In the Matter of RENEWED INVESTIGATION OF THE STATE POLICE CRIME LABORATORY, SEROLOGY DIVISION*, 219 W.Va. 408, 633 S.E.2d 762 (2006) (ZAIN III) because his conviction falls within the time period of 1979 and 1999. DNA testing is far more accurate than the general blood type testing done by the lab previously. The DNA test results will show that the Petitioner was not at the murder scene. A test will vindicate his rights under ZAIN III to "a searching and painstaking scrutiny" of the forensic evidence. 633 S.E.2d at 769.

Further, the test is a modest request. The West Virginia State Police Laboratory, which the Petitioner agreed could do the test, performs the tests on routine basis. The Petitioner's request creates no undue burden on the State or the Court. Does not justice demand a full accounting of the evidence when such an accounting is available? Even more so, when the original lab performed the original blood typing test under what is now a long-standing cloud of uncertainty? What is the State afraid of? Finally, a DNA test may very well identify the person who killed Mr. Tyree. The Petitioner has more than met his burden.

Again, there have been 233 post-conviction DNA exonerations in United States history. <http://www.innocenceproject.org/know/> Had Mr. Burdette been tried and convicted merely on the check charges, or even for obstruction of justice for lying during the police investigation, then clearly no complaint could be had. But Gregory Burdette was convicted and sentenced to two terms of life imprisonment for two crimes for which he denies any involvement, the capital crimes of kidnapping and first degree murder, and it is on these two convictions he seeks a statute based request for DNA testing.

Advanced STR or mitochondrial DNA testing of evidence decades old have been used in other cases to exonerate petitioners. This testing is generally accepted and was not available at the time of the trial. Further, the evidence in this case is believed to have been maintained in a condition permitting testing. This testing was not requested for purposes of delay. Further, *this standard DNA testing can be performed by the State Police*. There was no evidence offered below to suggest the State Police can't perform the test or that the standard testing they do, and which the State offers against other defendants, would not be adequate for Mr. Burdette. To accept the State's position would call into question the reliability of the DNA tests performed by the State Police in other murder and sex crimes cases. The Petitioner has satisfied the statutory elements for requesting DNA testing relief.

Moreover, the United States Supreme Court, heard arguments in *District Attorney v. Osborne*, Case No. 08-9, on March 2, 2009. The Defendant in that case was denied access to DNA testing. The Court heard arguments on whether there exists a constitutional right to DNA testing. This question has not been decided. The Petitioner adopts the arguments that a denial of DNA testing in this case would violate both

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA
ex rel. GREGORY BURDETTE,

Petitioner,

Supreme Court Number
Underlying Kanawha County Circuit
Court Action:
SER Burdette v. Haynes, Warden,
07-MISC-139

THE HONORABLE PAUL ZAKAIB, JR.
Kanawha County Circuit Court Judge,

APPENDIX A

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West Virginia Bar Number 8244
VICTOR VICTOR & HELGOE LLP
Post Office Box 5160
Charleston, West Virginia 25361
305-346-5638

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
28 MAR -2 PM 3:32
CATHY S. SANDERSON
KANAWHA CO. CIRCUIT COURT

STATE ex rel.
GREGORY C. BURDETTE,

Petitioner,

v.

Case No. 07-MISC-139
(Judge Zakaib)

WILLIAM S. HAYNES, WARDEN,

Respondent.

**ORDER DENYING PETITIONER'S MOTION
FOR POST CONVICTION DNA TESTING**

On the 27th day of October, 2008, came the Petitioner Gregory C. Burdette in person and by his counsel, Barron M. Helgoe, Esquire, and came the Respondent by counsel, Teresa A. Tarr, Assistant Prosecuting Attorney in and for Kanawha County West Virginia. After hearing argument of counsel and following a thorough review of the Petitioner's Motion, Memorandum and supplemental filing and the Respondent's reply brief, the underlying record, and applicable case law, the Court **FINDS** the matter ripe for decision and makes the following Findings of Fact and Conclusions of Law:

I.

FINDINGS OF FACT

1. Vincent Tyree (hereinafter "victim") was a teacher and coach at Sissonville Junior High School. On November 17, 1983, he left the school around 3:00 p.m. and disappeared.
2. On November 18, 1983, a hunter found the victim's body on a hill near a gas pipeline at Second Creek in Kanawha County. He had been shot twice in the head

and his body had been dragged down over the hill. The victim was shot once in the back of the head while walking up a hill. He was also shot once while lying face down on the ground.

3. There was a bloody spot on the ground that may have been where the victim was shot or where his body rested before being pulled down over the hill.
4. The police recovered one 38 caliber bullet from the ground. A second 38 caliber bullet was taken from the victim's head.
5. The victim's checkbook was stuffed into a pocket of his jacket. The checkbook had a bloody fingerprint on it. The victim's wallet and keys were missing and were never recovered.
6. The victim's shoes had been removed and were found by the hunter. Interestingly, the victim's socks were clean. This meant that his shoes had been removed post mortem. There were no fingerprints found on the shoes.
7. The police also found a cigarette lighter with drywall compound on it not far from the victim's body. They also recovered a cigarette butt with teeth marks on the filter.
8. The victim's jeep was later discovered abandoned in Sissonville near Humphrey's Church. It had been wiped clean of any prints.
9. At the time of his disappearance, the victim was in the process of building a three-unit apartment building in Sissonville.
10. The victim paid for materials and labor by check. He often kept his checkbook in the glove compartment of his jeep.
11. Petitioner was doing drywall work for the victim at the apartment building.

12. Initially, investigators spoke with Petitioner to see if the victim came by the construction site on the day of his disappearance. However, at some point, they ascertained that checks had been stolen from the victim and cashed by Petitioner.
 13. A handwriting expert, a fingerprint expert and two clerks from the Big H Store connected Petitioner to some, if not all, of the forged checks.
 14. FBI Latent Print Specialist Robert Moran testified at trial that the bloody fingerprint on the checkbook came from Petitioner's left middle finger (Tr. at 2934-2935, 2941-2942). It was the victim's blood on the checkbook.
 15. West Virginia State Police Serologist Lynn Inman tested several items including the cigarette butt found at the scene. At trial, Inman testified to the following:
 - Q. And on State's Exhibit No., cigarette butts from the scene, I believe you tested for saliva; is that correct?
 - A. Yes, ma'am, I did.
 - Q. Okay, and what, if any results did you find here?
 - A. Saliva identified on the cigarette butts from the scene contained the genetic marker ABO Type O.
 - Q. Okay. Were you able to get any further genetic markers than that?
 - A. No, ma'am, saliva is the only genetic marker we test for is the ABO. . . .
 - Q. When you are testing saliva, the only thing that you test for is ABO blood types?
 - A. Yes, ma'am.
- (Tr. at 2777-2778). Inman also testified at trial that she tested known cigarette butts from Petitioner that were retrieved from his car and house and determined from the saliva found on them that he was ABO Type O (Tr. at 2782-2783).
16. With respect to the instant habeas and Motion, Petitioner does not dispute that his blood type is ABO Type O.
 17. In an effective cross-examination by Petitioner's attorney, Inman acknowledged that the cigarette butt in question may not belong to Petitioner:

- Q. Oh, goodness, does that mean that the cigarette that was found at the scene is my client's cigarette?
- A. No, sir I can only say that the blood types are consistent.
- Q. Well, how many -- what percentage of the population has O type blood?
- A. Forty-three percent would be type O, but eighty percent are secretors, so thirty-four percent would secrete a type O, on that cigarette butt.
- Q. Thirty-four percent, one-third of the people in this country have type O blood then?
- A. Thirty-four percent are type O secretors.
- Q. O secretors?
- A. Yes, sir.
- Q. And what percent are type O, forty-three percent?
- A. Yes sir.
- Q. So, almost half the people in this country have type O blood?
- A. Yes, sir.
- Q. Now is the only genetic marker that your laboratory is capable of doing on a saliva examination is that just to determine whether a person's blood is type A, B, AB, ABO or O?
- A. Yes, sir.
- Q. That's all you can do?
- A. Yes, sir.
- Q. You can't check saliva any further than that?
- A. No, sir. . . .
- Q. [O]h, by the way, did you ever check Greg Burdette's blood?
- A. No, sir.
- Q. You don't know what his type is; do you?
- A. From the known cigarette butts, yes, sir, he is an O.
- Q. But you never checked his blood?
- A. No, sir.

(Tr. at 2784-2786).

17. At trial, Petitioner admitted that he filled out and uttered at least six checks that had been stolen from the victim's checkbook. He cashed them at the Big H store using the alias "Dale Burdette." He also placed his sister's telephone number on the check. Through the forgery and uttering scheme, Petitioner obtained approximately \$2,300.00.

18. Petitioner also admitted that he used money from the forged checks to purchase a handgun and ammunition on November 10, 1983, just one week before the murder. When purchasing the .38 special revolver and bullets, Petitioner used a fraudulent driver's license with his own photograph but with his brother's identifying information.
19. The bullets that were recovered from the murder scene were the same caliber as the bullets Petitioner purchased on November 10, 1983.
20. The murder weapon was never recovered. Petitioner claimed that the gun had been thrown into a river. Sometimes, he said it was thrown into the Kanawha River near Patrick Street. In other statements, he claimed that it was thrown into the river from a bridge on Poca River Road.
21. At trial, both Petitioner and his wife testified that he had thrown his new revolver into the Kanawha River three days after the victim was murdered. Petitioner testified that he also threw a box of .38 caliber bullets in the River. Petitioner testified that he through the gun away because he thought the police would find him with it and charge him with the victim's murder.
22. Petitioner also gave the police a series of statements regarding the stolen checks and the victim's murder:
 - a. Petitioner initially denied any involvement except to state that he signed the victim's name to the checks. However, after Petitioner had given handwriting exemplars to the State Police, he acknowledged that he had actually filled out the checks as well. He then stated that the checks had been stolen by Kenneth "Butch" Mitchell, with whom he had split the proceeds;
 - b. Petitioner next claimed that Mitchell had killed the victim to cover up the crimes relating to the checks. Petitioner maintained that he

knew nothing about the killing until Mitchell took him to see the victim's body;

- c. Petitioner then asserted that his partner in crime was named Billy Eads. He then changed the name to Billy Edens and finally Billy Helmick; and
- d. In each of the scenarios, Petitioner claimed that his partner in crime (whose identity kept changing as well) had been caught by the victim in the school parking lot attempting to steal additional checks from the glove compartment of the victim's jeep. Petitioner's story was that this mysterious partner then pulled a gun and made the victim drive the three of them to the remote location on Second Creek where the victim was shot and killed.
- e. Interestingly, Petitioner acknowledged in the statements that the victim's shoes did not have any fingerprints on them because they had been held by a coat. He also stated in one of the statements that he had wiped the victim's Jeep of any fingerprints. Petitioner also stated in one of his statements that he had blood on his hands. These statements were made before any of the forensics had been done on the items in question or before the information became public knowledge.

23. Although Petitioner said that he lied throughout his various statements, he acknowledged on cross examination that the details he gave during those times matched what happened to the victim and the evidence adduced in the case:

- Q. Who said there was a blood spot up there on the ridge?
- A. I did.
- Q. Who said that the body was on its face?
- A. I did.
- Q. Who said it had been shot twice?
- A. I did.
- Q. Who said that he was shot once while walking up the hill?
- A. I did.
- Q. And who said that that shot was to the back of the head?
- A. I did.
- Q. Who said he was shot once while he was facedown on the ground?
- A. I did.
- Q. Who said the body was turned over?
- A. I did.
- Q. Who said he was dragged over the hill?
- A. I did.

Q. Who said that they had a cigarette in their hand going up the hill?
A. I did.
Q. Who said the Jeep was parked up there close to where Mr. Tyree was shot?
A. I did.
Q. Who said he was pulled by his feet?
A. I did.
Q. Who said his shoes were jerked off?
A. I did.
Q. Who said you drove back down off the hill?
A. I did.
Q. Who said the wallet was taken?
A. I did.
Q. Who said the keys were taken?
A. I did.
Q. Who said a card was taken from Mr. Tyree's wallet?
A. I did.
Q. Who said that there was a checkbook handled on the scene?
A. I did.
Q. Who said that there was – had blood on their finger
A. I did.
Q. Who said that the shoes were thrown out in the hollow?
A. I did.
Q. Who said the shoes were thrown to the left?
A. I did.
Q. Who said the Jeep was parked at the church?
A. I did.
Q. Who said it's their handwriting on their checks?
A. I did.
Q. Who said there was a gas line on the hill?
A. I guess I did. I don't remember.
Q. I will show you in a minute. Who said he was pulled over the hill?
A. I did.
Q. Who said they'd bite their cigarettes?
A. I did.
Q. Who said there was a logging road up there?
A. I did.

(Tr. at 4303-4305).

24. Likewise, Petitioner acknowledged at trial that the description he gave to the police of the killer closely resembled him:

Q. Who described in these statements, who said that the killer, Mr. X, parted his hair in the middle?

- A. In the statements?
- Q. Uh-huh.
- A. I did.
- Q. Who said he had shoulder length hair?
- A. I did.
- Q. Who said he had thick eyebrows?
- A. I did.
- Q. Who said he had a mustache?
- A. I did.
- Q. Who said he had a small beard?
- A. I did.
- Q. Who said he wore blue jeans?
- A. I did.
- Q. Who said he had a blue jean jacket?
- A. I did.
- Q. Who said he wore tennis shoes?
- A. I did.
- Q. Who said he had a flannel shirt?
- A. I did.
- Q. Who said he had a scar over his right eye?
- A. I did.
- Q. Who said he had gaps in his teeth?
- A. I did.
- Q. Who said he drove a green car?
- A. I did.
- Q. Who said he was the same age as you?
- A. I did.
- Q. Who wore their hair parted in the middle?
- A. A lot of people does.
- Q. Did you?
- A. Yes.
- Q. Who had shoulder length hair?
- A. I did.
- Q. Who had thick eyebrows.
- A. I guess I do.
- Q. Who had a mustache back then?
- A. I did.
- Q. Who had a small beard?
- A. My beard wasn't that small.
- Q. Was it a thick beard?
- A. It was thick towards the bottom.
- Q. Well, the jury has seen the photographs. Who had blue jeans?
- A. I did.
- Q. Who had a blue jean jacket?
- A. I did.
- Q. Who had tennis shoes?

- A. I did.
Q. Who had a flannel shirt on?
A. I did.
Q. Who had a scar over their right eye?
A. Got one on my right and left.
Q. Who had a scar on their right eye?
A. I did.
Q. Who had gaps in their teeth?
A. I did.
Q. Who had a green car?
A. I did.
Q. Who was the same age as the killer, twenty-three at that time, right?
A. In the statement, I did.

(Tr. at 4306-4308).

25. At one point, Billy Edens was arrested and lodged in the Kanawha County Jail. Greg Elswick was an inmate there at the same time. Elswick was still in jail when Petitioner was arrested. At trial, Elswick testified that Petitioner wanted him to tell Petitioner's lawyers that while they were incarcerated together Edens admitted killing the victim. One of the things Elswick was to say was that Edens told him it was "easy" to kill someone and that it "only took a second." These same remarks recur throughout the various statements Petitioner gave police.
26. A recurring theme throughout the State's case was the similarity between Petitioner's own appearance and the physical description he gave of the killer in each of the various statements to the police. The alleged accomplice and Petitioner both had long hair, facial hair, gaps between the teeth and a scar over one eyebrow. The theory was that Petitioner changed details to deflect blame from him but otherwise stuck to a story that fairly accurately described the events leading to the victim's death, including the description of himself as the murderer.

27. At trial, Petitioner relied on an alibi defense. Three friends testified that they recalled seeing Petitioner at the Go-Mart in Spring Hill on November 17, 1983, at various times around 3:40 p.m. This was significant to the defense because a custodian was able to say that she saw the victim leave the school just before she clocked out at 3:07 p.m. on that day. Importantly, none of the witnesses was asked about providing an alibi until two and a half years after the crime.
28. One alibi witness testified that he was sure that he saw Petitioner at the 7-Eleven but later asked if he could take the stand again to correct his testimony to make it the Go-Mart.
29. One alibi witness was unable to describe Petitioner's appearance at the time. The witness testified that Petitioner had short hair and no facial hair on November 17, 1983. However, a photograph taken on November 18, 1983, showed that Petitioner had long hair. He also had a mustache and a beard.
30. Petitioner's mother and sister also testified at trial. They claimed that they were on the telephone with one another when Petitioner arrived home at 4:00 p.m. They established the time of the telephone call based on their television viewing schedule.
31. On April 11, 1986, a Kanawha County petit jury found Petitioner guilty of six counts of forgery, six counts of uttering, one count of kidnapping without a recommendation of mercy and one count of first-degree murder with a recommendation of mercy. The first-degree murder count was for felony-murder based on the underlying crime of robbery.

32. Following the verdict, the trial court sent the jury back to add a date that had been omitted from the verdict form. While addressing the jury on the issue of the date, the trial court also explained that their verdict, as reported, would allow parole for the murder conviction but not for the kidnapping count and asked them to confirm that this was the result that they intended. The verdict remained unchanged except for filling in the omitted date.
33. On June 2, 1986, the trial court sentenced Petitioner to concurrent sentences. The net effect was that Petitioner received a life sentence with no hope of parole.
34. On August 3, 1989, Petitioner filed a Petition for Appeal with the West Virginia Supreme Court of Appeals. By Order entered November 7, 1989, the State Supreme Court refused the petition.
35. In 1993, Petitioner filed a Petition for Writ of Habeas Corpus in the Circuit Court of Kanawha County. The case was styled 93-W-56. Petitioner filed his *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981) checklist on or about June 21, 2001. An amended Petition was filed on or about June 10, 2002.
36. Petitioner raised the following grounds for relief in 93-W-56: (a) denial of due process and a fair trial as a result of the introduction of tainted serological evidence [*Zain* issue]; (b) denial of due process because conviction was based on insufficient evidence to support underlying felony of robbery as the predicate for a felony-murder conviction; (c) denial of due process based on improper kidnapping instruction; (d) denial of due process based on an improper aggravated robbery instruction; (e) prosecutorial misconduct pertaining to comments about Petitioner's failure to call a specific alibi witness; (f) prosecutorial misconduct for

commenting on the pre-trial silence of alibi witnesses; (g) prosecutorial misconduct for attempting to improperly influence the jury; and (h) prosecutorial misconduct for appealing to the passion or prejudice of the jury.

37. Respondent filed a reply to the Petition on or about September 6, 2002. An evidentiary hearing was held on July 25, 2003. On January 26, 2004, the Court denied the habeas petition in a detailed 16 page opinion that addressed each of the claims on the merits.
38. Petitioner subsequently filed a Petition for Appeal with the State Supreme Court. On January 19, 2005, the Court refused the Petition for Appeal.
39. On or about March 27, 2007, Petitioner filed the instant habeas petition. On July 10, 2008, Petitioner filed a Motion for Post-Conviction DNA Testing Pursuant to W. Va. Code § 15-2B-14. Petitioner's request is limited to a re-testing of only the cigarette butts. The Motion was filed as part of the instant habeas petition.

II.

CONCLUSIONS OF LAW

40. In Syllabus point 1 of *In the Matter of Renewed Investigation of State Police Crime Laboratory*, 219 W. Va. 408, 633 S.E.2d 762 (2006) (hereinafter *Zain III*), the West Virginia Supreme Court of Appeals stated that a conviction based on false evidence will not be set aside "unless it is shown that the false evidence had a material effect on the jury verdict." *See also* Syl. pt. 2, *In the Matter of an Investigation of the West Virginia State Police Laboratory*, 190 W. Va. 321, 438 S.E.2d 501 (1993) (hereinafter *Zain I*).

41. In *Zain III*, the Court stated that “[s]erology reports prepared by employees of the Serology Division of the West Virginia State Police Crime Laboratory, other than Trooper Fred S. Zain, are not subject to invalidation and other strictures contained in [*Zain I*].” Syl. pt. 2, *Zain III*; Syl. pt. 3, *Matter of W. Va. State Police Crime Lab*, 191 W. Va. 224, 445 S.E.2d 165 (1994) (hereinafter “*Zain II*”).

42. The Court also stated:

[A] prisoner who challenges his or her conviction must prove that the serologist offered false evidence in his or her prosecution. Also, the prisoner must satisfy the following standards indicating that a new trial is warranted: A new trial will not be granted on the ground of newly discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained; (2) it must appear from facts stated in his affidavit that [defendant] was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict; (3) such evidence must be new and material; and not merely cumulative and cumulative evidence is additional evidence of the same kind to the same point; (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits; and (5) the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side. . . .

In addition . . . this Court finds it necessary to enact additional safeguards to ensure that prisoners against whom serologists offered evidence receive a thorough, timely and full review of their challenges to the serology evidence. To this end, we direct the following. First, a prisoner against whom a West Virginia State Police Crime Laboratory serologist, other than Fred Zain, offered evidence and who challenges his or her conviction based on the serology evidence is to be granted a full habeas corpus hearing on the issue of the serology evidence. The prisoner is to be represented by counsel unless he or she knowingly and intelligently waives that right. The circuit court is to review the serology evidence presented by the prisoner with searching and painstaking scrutiny. At the close of evidence, the circuit court is to draft a comprehensive order which includes detailed findings as to the truth or falsity of the serology evidence and if the evidence

is found to be false, whether the prisoner has shown the necessity of a new trial based on the [foregoing] five factors

Zain III at ___, 633 S.E.2d at 769.

43. In such cases, the Court also suspended “to a limited degree” the rules of *res judicata* that generally apply in a habeas proceeding. *Id.*
44. The State Supreme Court’s ruling in *Zain III* does not afford every petitioner with serology issues the right to an evidentiary hearing. The clear import of *Zain III* is that the evidence tested must likely produce an opposite result if a new trial were to occur and that it can’t be such that it would simply impeach or discredit a State’s witness. The cigarette butt was merely one cog in the wheel. Even if that piece of evidence was subtracted from the evidence adduced at trial, the State still had overwhelming evidence to convict Petitioner. This is evidenced by the testimony surrounding the cigarette butt that was adduced during the cross examination of Serologist Inman. She acknowledged that 34% of the population has ABO Type O blood; and therefore, anyone could have left the cigarette butt at the scene. The jury heard this evidence and chose to convict anyway. Based upon the foregoing, Petitioner is not entitled to the relief requested. Accordingly Petitioner’s Motion must be denied.
45. Petitioner’s reliance on W. Va. Code § 15-2B-14 is likewise misplaced. This provision also does not mandate testing in every case. W. Va. Code § 15-2B-14(a) states that “[a] person convicted of a felony currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction for performance [DNA] testing.” W. Va. Code §15-2B-14(m) reinforces the notion that testing is not absolute. The provision states that

“the right to file a motion for post-conviction DNA testing . . . is absolute and may not be waived.” Thus, the legislature gave a defendant the absolute right to ask for DNA testing but not the absolute right to have DNA testing conducted. Had the legislature wanted to make DNA testing mandatory in all cases it would have said so. It didn’t. It only gave the absolute right to request DNA testing.

46. The Motion must also: (a) explain why the identity of the perpetrator was, or should have been, a significant issue in the case; (b) explain in light of all the evidence, how the requested DNA testing would raise a reasonable probability the convicted person’s verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction; (c) make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought; (d) reveal the results of any DNA or other biological testing previously conducted by either the prosecution or defense, if known; and (e) state whether any motion for testing under this section has been filed previously and the results of that motion, if known. *See W. Va. Code* § 15-2B-14(c)(1).

47. In his Motion, Petitioner fails to fulfill the requirements listed in Paragraph 51 above. He merely makes blanket assertions. DNA testing would not raise a reasonable probability that the Petitioner’s verdict would be more favorable if the results of the testing had been available at the time. Again, this is demonstrated by the overwhelming evidence proffered by the State at trial. It is also evidenced by the fact that during cross examination of Serologist Inman, she acknowledged that 34% of the population had ABO Type O blood and anyone with that blood

type could have left the cigarette there. The jury heard this evidence at trial and chose to convict anyway.

48. Petitioner also fails to identify the type of DNA testing that he would like done on the cigarette butt in question or the qualifications of the lab that he is requesting to perform the work. Based upon this, Petitioner's motion must be denied.
49. W. Va. Code § 15-2B-14(f) states that a court shall grant a motion for DNA testing if all of the following have been established: (1) the evidence tested is available and in a condition that would permit the DNA testing requested; (2) the evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect; (3) the identity of the perpetrator of the crime was, or should have been, a significant issue in the case; (4) the convicted person has made a prima facie showing that the evidence sought for testing is material to the issue of the convicted person's identity as the perpetrator of or accomplice to, the crime, special circumstance, or enhancement allegation resulting in the conviction or sentence; (5) the requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if DNA testing results had been available at the time of the conviction; (6) the evidence was either not previously tested or the evidence was tested previously but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results; (7) the testing requested employs a method

generally accepted within the relevant scientific community; (8) the evidence or the presently desired method of testing DNA were not available to the defendant at the time of trial or a court has found ineffective assistance of counsel at the trial court level; and (9) the motion is not made solely for the purpose of delay. With respect to number (5), the court may consider any evidence regardless of whether it was introduced at trial.

50. Petitioner cannot show that the evidence sought to be tested is material to the issue of identity. Again, when the Court considers the overwhelming evidence introduced at trial to convict Petitioner and the cross examination evidence elicited from Serologist Inman, it is clear that the cigarette butt was not a material piece of evidence. The jury also heard that the butt was found in an open wooded area that was frequented by other people. Indeed, it was a hunter who found the body of the victim the day after the shooting. Moreover, the Petitioner in his statements to police places himself at the scene of the crime. For the reasons set forth above, he also can't demonstrate that the outcome of his trial would have been different had the cigarette butt belonged to someone else. The Petitioner has also failed to address the manner, method and means of testing. Based upon this, the Court must deny his Motion.

III.

RESOLUTION

Based upon the foregoing, the Court **DENIES** Petitioner's Motion for Post Conviction DNA Testing. The Court notes the Petitioner's objection and exception to its ruling. Lastly, the Court **ORDERS** certified copies of this Order and Opinion to be

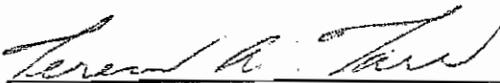
provided to all counsel of record and Petitioner.

ENTER THIS 27th day of Feb, 2008

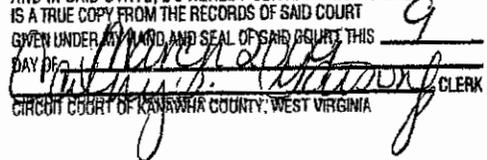


Paul Zakaib, Jr., Judge
Thirteenth Judicial Circuit

Presented by:



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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 9
DAY OF MARCH, 2008


CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA